No.____

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In the

SUPREME COURT OF THE UNITED STATES

---

October Term, 1982

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Foy Haskell Dawkins and
Mary Lorena Dawkins, Petitioners,

v.

Jody Dawkins Fenslage, Respondent

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APPENDIX

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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No. 81-1502

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In the Matter of
FOY HASKELL DAWKINS and
MARY LORENA DAWKINS, Debtors

FOY HASKELL DAWKINS and
MARY LORENA DAWKINS,
Appellants,

versus

JODY DAWKINS FENSLAGE,
Appellee.

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Appeal from the United States District Court
for the Northern District of Texas

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(March 24, 1982)

Before RUBIN, SAM D. JOHNSON and GARWOOD, Circuit Judges.

RUBIN, Circuit Judge:

Acting pursuant to a levy in execution of a federal court judgment, duly recorded in the records of Armstrong County, Texas, the United States Marshal sold a half-section of ranch land on November 7, 1978. The judgment creditor, Jody Fenslage, was the successful bidder. The former landowners and judgment debtors, Foy Haskell Dawkins and Mary Lorena Dawkins, filed

suit in state court to void Fenslage's deed insofar as it conveyed a 200-acre portion of the property, claimed to have been their homestead. The case was properly removed to federal district court, then transferred promptly to bankruptcy court, in accordance with the local rules of court, because the judgment debtors had filed Chapter XI bankruptcy proceedings. The Dawkinses protested that the property sold had been their homestead and that the 1978 judgment lien, for the satisfaction of which the property was sold, was a voidable preferential transfer. The bankruptcy court dismissed the suit. The district court affirmed the dismissal and also held that the Dawkinses had not been entitled to a jury trial in bankruptcy court. We affirm.

Jody Fenslage recovered a judgment against the Dawkinses and others. On August 17, 1978, an abstract of this judgment was filed, indexed, and recorded in records of the Armstrong County Clerk in accordance with Tex. Rev. Civ. Stat. Ann. arts. 5447-5448 (Vernon 1958 & Cum. Supp. 1981), as amended by id. art. 1941(a) (Vernon Supp. 1965-1981). The Dawkinses posted no supersedeas bond, but appealed the judgment to this court. On October 6, 1978, while the case was pending on appeal, the United States Marshal levied on the half-section, and, on November 7, he sold it. Two years later, on November 6, 1980, we affirmed the Fenslage judgment. Fenslage v. Dawkins, 629 F.2d 1107 (5th Cir. 1980). On February 2, 1981, the Dawkinses filed a petition in bankruptcy seeking relief under Chapter XI.

In 1981 the Dawkinses filed this suit in state court to void the Marshal's sale. On February 13 their suit was removed to federal district court and transferred to the bankruptcy court. The bankruptcy court held that the property was not the Dawkinses' homestead, that it was not, therefore, exempt under Texas law, and that the judgment lien was not a preferential

transfer. In re Dawkins, 11 B.R. 213 (Bankr. W.D. Tex. 1981).

The Dawkinses assert that a 200-acre portion of the half-section was their homestead because they had farmed it for fifty years. Yet when the sale occurred, there was neither house nor home on this property. The Dawkinses lived in a nearby community, Claude, and had indeed claimed the Claude residence as their homestead.

As the district court noted, under Tex. Rev. Civ. Stat. Ann. art. 5449 (Vernon 1958), an abstract of judgment operates as a lien from the date of proper recording. Accord, e.g., TPEA No. 5 Credit Union v. Solis, 605 S.W.2d 381, 383 (Tex. Civ. App. 1980); Askey v. Power, 36 S.W.2d 446, 447 (Tex. Comm'n App. 1931). The lien on the property runs from the date of recording, notwithstanding the filing of an appeal from the judgment. See Texas Trunk R.R. v. Jackson, 22 S.W. 1030, 1031 (Tex. 1893); Semple v. Eubanks, 35 S.W. 509, 510, (Tex. Civ. App. 1896). McDonald v. Ayres, 242 S.W. 192, 195 (Tex. Comm'n App. 1922). In this case, on the date the judgment was recorded, the 200-acre property was the home of no one. Conceding this, the Dawkinses contend that the property was used "as a place to exercise [their] calling or business to provide for [their] family" and was, for that reason, a homestead. Tex. Rev. Civ. Stat. Ann. art. 3883(a) (Vernon Cum. Supp. 1981).

That argument, however, must fail, for the bankruptcy court properly found that a debtor can have but one homestead at a time, and that, on August 17, 1978, the Dawkinses' homestead was in Claude, at 404 Wilson Street.[1] The party who claims a homestead exemption bears the burden of proving the existence of the homestead. See Burk Royalty Co. v. Riley, 475 S.W.2d 566, 568 (Tex. 1972); Campbell v. First Nat'l Bank, 88 S.W.2d 1084, 1086 (Tex. Civ.

App. 1935); Taylor v. First Nat'l Bank, 288 S.W. 235 (Tex. Civ. App. 1926). Without an abandonment of an existing homestead, homestead status cannot be affixed to another property. Archibald v. Jacobs, 6 S.W. 177, 178-79 (Tex. 1887); Floyd v. Rice, 444 S.W.2d 834, 836 (Tex. Civ. App. 1969); Towery v. Plainview Bldg. & Loan Ass'n, 99 S.W.2d 1039, 1041 (Tex. Civ. App. 1936). And the mere intention to abandon one homestead and to create another does not suffice to divest the original homestead of its original character. Archibald v. Jacobs, 6 S.W. at 178 ("Abandonment of property actually homestead cannot be accomplished by mere intention."); Major v. Loy, 155 S.W.2d 617, 623 (Tex. Civ. App. 1941) ("A homestead cannot be acquired by mere intention alone."); Markum v. Markum, 210 S.W. 835, 841 (Tex. Civ. App. 1919). Even if, prior to August 17, 1978, the Dawkinses had been planning the sale of the property at 404 Wilson Street and the building of a new residence on the half-section of ranch land, they did not perform acts sufficient to demonstrate abandonment of their present homestead. As a result, when the judgment lien attached, the Dawkinses' homestead remained at 404 Wilson Street. See Ray V. Metzger, 165 S.W.2d 207, 210 (Tex. Civ. App. 1942)("Whether or not lands constitute a homestead depends at least to some extent upon the intention of the or; perhaps the best evidence of that intention is occupancy and use."), aff'd., 173 S.W.2d 480 (Tex. 1943).

Absent the posting of a supersedeas bond, the federal court appeal did not suspend execution of the judgment. Because the lien was perfected in 1978, the subsequent sale, in November 1978, was proper. The recording of the lien was not a preferential transfer because it occurred more than three months, indeed two years, before the bankruptcy petition was filed. 11 U.S.C. §547 (Supp. IV 1980). The later affirmance of the district court's judgment by

this court was not necessary to perfect the judgment lien. Thulemeyer v. Jones, 37 Tex. 560, 571 (1872); Smith v. Kale, 32 Tex. 290, 294 (1869); Roman v. Goldberg, 7 S.W.2d 899 (Tex. Civ. App. 1928).

The Dawkinses also contend that they were improperly denied a jury trial. The local bankruptcy rules require that a specific demand for a jury trial be made within ten days after removal. Bankr. N.D. Tex. R. 7004(g). The Dawkinses never demanded a jury trial although they stated that they might later elect to do so. Fenslage contends, and the Dawkinses do not deny, that the Dawkinses announced that they were ready for trial and proceeded to bench trial without protest, and that even in their posttrial memorandum, they never objected to the bench trial. They have, therefore, waived their right to demand a jury trial. Duncan v. First Nat'l Bank, 597 F.2d 51, 54-56 (5th Cir. 1979); Bush v. Allstate Ins. Co., 425 F.2d 393, 395-96 (5th Cir.), cert. denied, 400 U.S. 833, 91 S. Ct. 64 (1970); Chandler Supply Co., v. GAF Corp., 650 F.2d 983, 986-87 (9th Cir. 1980); Transocean Air Lines v. Pan American World Airways, Inc., 36 F.R.D. 43, 45 (S.D.N.Y. 1964)("There is no longer any occasion to indulge any presumption against waiver.").

The other issues merit only passing comment. Much is made of the fact that the transfer to the bankruptcy court occurred ten minutes after the case was removed to federal court. No question concerning the propriety of the removal is raised. Once removed, the case was properly transferred to the bankruptcy court, and it was unnecessary for the party seeking transfer to file notice of a hearing. Because of the pendency of the Chapter XI proceeding, the bankruptcy court exercised all jurisdiction over the matter, 28 U.S.C.§1471(c) (Supp. III 1979); see Cross Elec. Co., v. United States, 512 F. Supp. 511, 512 (W.D. Va. 1980),

for, if the sale of the alleged homestead had been set aside, the property would have become part of the Dawkinses' estate, 11 U.S.C. §749. Had the transfer been procedurally improper, the proper course for the Dawkinses would have been to file a motion to transfer the case back to the district court. 28 U.S.C. §1478(b) (Supp. III 1979); In re Ebrights Refrigeration Equip., 13 B.R. 546, 548-49 (Bankr. S.D. Ohio 1981); In re. Sulzer, 7 B.R. 475, 476 (Bankr. S.D.N.Y. 1980). See generally Harris v. Edward Hyman Co., 664 F.2d 943 (5th Cir. 1981).

Finally, the Dawkins contend that the property was sold for inadequate consideration. This issue, however, was not raised below, no evidence of inadequate consideration was offered at the trial, and the burden of proof of this issue was on the Dawkinses. Thus we decline to consider this contention. E.g., Equitable Trust Co. v. Commodity Futures Trading Comm'n, No. 81-1020, slip op. at 1126 (5th Cir. Mar. 3, 1982); Jackson v. United States Postal Serv., 666 F.2d 258, 260-61 (5th Cir. 1982)(per curiam).

For these reason, the judgment is AFFIRMED.

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[1] While a homestead may embrace both a residence homestead on one lot and a business homestead on an entirely separate lot, provided both are in the same urban community, they are nevertheless but separate parts of a single homestead. There cannot be two homesteads in the sense of a residence homestead in one urban community and a business homestead in another, nor can a family or a single person have both an urban and a rural homestead. Realty Trust Co. v. Koger, 70 S.W.2d 448, 451 (Tex. Civ. App. 1934, writ ref'd); Purdy v. Grove, 35 S.W.2d 1078, 1081-82 (Tex. Civ. App. 1931, writ ref'd); Rutherford v. Hughes, 103 F. Supp. 161, 163-65

(E.D. Tex. 1952), rev'd on other grounds, 201 F.2d 161 (5th Cir. 1953); Commerce Farm Credit Co. v. Sales, 288 S.W. 802 (Tex. Com. App. 1926, holdings approved).

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

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No. 81-1502
Summary Calendar

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D. C. Docket No. CA-2-81-136

IN THE MATTER OF: ROY HAWKELL DAWKINS AND MARY LORENA DAWKINS, Debtors.

FOY HAWKELL DAWKINS and
MARY LORENA DAWKINS,
Appellants,

versus

JODY DAWKINS FENSLAGE
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS

Before RUBIN, SAM D. JOHNSON and GARWOOD, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas, and was taken under submission by the Court upon the record and briefs on file, pursuant to Rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that

the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

It is further ordered that appellants pay to appellee the costs on appeal to be taxed by the Clerk of this Court.

March 24, 1982.

ISSUED AS MANDATE: May 3, 1982.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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81-1502

---

In the matter of: FOY HASKELL DAWKINS and MARY LORENA DAWKINS, Debtors.

FOY HASKELL DAWKINS and
MARY LORENA DAWKINS,
Appellants,

versus

JODY DAWKINS FENSLAGE,
Appellee.

- - - - - -

Appeal from the United States District Court
for the Northern District of Texas

- - - - - -

ON PETITION FOR REHEARING
(April 21, 1982)

Before Rubin, Sam D. Johnson and Garwood, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/ Alvin B. Rubin
United States Circuit Judge

"Filed U.S. Court of Appeals April 21, 1982
Gilbert F. Ganucheau, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISRICT OF TEXAS
AMARILLO DIVISION

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| IN RE: | ) | |
| | ) | |
| FOY HASKELL DAWKINS | ) | |
| and | ) | |
| MARY LORENA DAWKINS | ) | |
| | ) | |
| DEBTORS | ) | |
| | ) | |
| FOY HASKELL DAWKINS | ) | CIVIL ACTION |
| NO. and | ) | CA-2-81-136 |
| MARY LORENA DAWKINS, | ) | |
| Plaintiffs | ) | |
| | ) | |
| V. | ) | |
| | ) | |
| JODY DAWKINS FENSLAGE, | ) | |
| | ) | |
| Defendant. | ) | |

MEMORANDUM AND ORDER

Foy Haskell Dawkins and Mary Lorena Dawkins, debtors, appeal from a judgment entered by the Honorable Bill Brister, a Bankruptcy Judge for the Northern District of Texas, denying and dismissing a complaint by the Debtors to avoid the deed of the United States Marshal to Jody Fenslage, dated November 13, 1978, conveying to her the title to the West one-half (W 1/2) of Section 172, Block B-4, H&GN Survey, Cert. 15/3465, Armstrong County, Texas. The issues on appeal are:

1. Whether appellant debtors were denied the right of trial by jury;

2. Whether the Court erred in concluding that the subject land was not the homestead of the appellants at the time the judgment lien attached; and

3. Whether the Fenslage judgment (under which the sale by the United States Marshal was conducted) was a voidable preferential transfer.

I.

Jody Fenslage recovered a judgment against Debtors and others in the amount of $130,000 in this Court, CA-2-76-126. On August 17, 1978, Jody Fenslage filed, indexed and recorded in Armstrong County abstracts of judgment in accordance with the requirements of V.A.T.S. Article 5447. At that time Debtors lived at 404 Wilson Street in Claude, Texas, and considered their home at that location as their homestead. Plaintiffs also owned the following rural property in Armstrong County, Texas:

> The West One-half (W 1/2) of Section 172, Block B-4, HG&N Survey, Cert. 15/3465, Armstrong County, Texas.

On August 26, 1978, Debtors sold the property at 404 Wilson Street to their daughter, Anita Foy Fetke, although they continued to live at that address.

Debtors appealed to the Court of Appeals for the Fifth Circuit, although they did not file a supersedeas bond. On October 6, 1978, the U. S. Marshal levied on the half section of rural land, and on November 7, 1978, the land was sold to Jody Fenslage, the highest bidder. The Debtors seek to avoid sale of this land.

On November 6, 1980, the United States Court of Appeals for the Fifth Circuit affirmed the judgment of the District Couirt. Fenslage v. Dawkins, et al., 629 F.2d 1107 (5th Cir. 1980).

On February 2, 1981, Debtors filed a petition in bankruptcy for relief under Chapter XI.

II.

Appellant Debtors contend that they were improperly denied a trial by jury. Rule 7004(g) of the Local Bankruptcy Rules for the United States Bankruptcy Court for the Northern District of Texas state that:

> If at the time of removal all necessary pleadings have been served, a party entitled to trial by jury shall be accorded it, if his demand is served ... if he is not the applicant, within 10 days after service on him of the notice of filing of the application.

A copy of the notice of filing of application for removal was served upon debtors through their counsel. Debtors replied in a motion and answer, in which they moved on page 2, that:

> 4.b. Prior to the occasion of a time set for a hearing on an Adversary proceeding, these Debtors are by law permitted an opportunity to then elect whether or not Debtors may desire a trial by jury.

and on page 3, that:

> e. Authorization for an election of trial by jury should be afforded both parties prior to a time setting of an adversary hearing,

Such language is clearly not a request for a jury trial. Instead, it requests authorization for an election of a jury trial, at a future date. Such authorization is not contemplated by the bankruptcy rules as stated in Rule 7004(g):

> The failure of a party to make demand as directed constitutes a waiver by him of trial by jury.

The Court concludes that the Debtors failed to properly request a jury trial under Rule 7004(g), and thus were not entitled to trial by jury.

III.

Appellant Debtors contend that the Bankruptcy Judge erred in concluding that the half-tract of 200 acres was not the homestead of the Debtors at the time that the judgment liens attached.

Under V.A.T.S. Article 5549 an abstract of judgment operates from the date of proper recording and indexing as a lien. The filing of an appeal does not preclude the perfection of an abstract of judgment, and affirmance will result in a lien dating from the date of the proper filing of the abstract of judgment. Semple v. Eubanks, 13 Tex. Civ. App. 418, 35 S.W. 509 (1896). Therefore, in the present case, the judgment lien dates to August 17, 1978, when Jody Fenslage properly filed her abstracts of judgment.

A judgment lien has precedence over a subsequently acquired homestead right. Baird v. Trice, 51 Tex. 555 (1879); Johnson v. Prosper State Bank, 125 S.W.2d 707 (Tex. Civ. App. -- Dallas 1939, writ ref'd); First Realty Bank & Trust V. Youngkin, 568 S.W.2d (Tex. Civ. App. -- Eastland 1978, no writ). As a result, the half-tract of 200 acres must have been the homestead of the debtors on August 17, 1978, for the homestead exemption to save the 200 acres from the judgment lien and subsequent execution sale.

Without an abandonment of an existing homestead, the homestead character cannot be affixed to another property. Archibald v. Jacobs, 6 S.W. 177 (Tex. 1887); Floyd v. Rice, 444 S.W. 2d 834 (Tex. Civ. App. -- Beaumont 1969, writ ref'd n.r.e.); Towery v. Plainview Building and Loan Association, 99 S.W.2d 1039 (Tex. Civ. App. -- Amarillo, 1936, writ ref'd). The mere intention to abandon one homestead and to create another does not suffice. Little v. Baker, 11 S.W. 549 (Tex. 1889); Bass v. Ware, 203 S.W.2d 1001 (Tex. Civ. App.-- Waco 1947, writ ref'd n.r.e.) Even if the Debtors had been planning the sale of the property at 404 Wilson Street and the building of a new residence on the rural acreage prior to August 17, 1978, they did not perform acts sufficient to demonstrate abandonment of their present homestead. As a result, at the time that the judgment lien attached, the homestead of the Debtors remained at 404 Wilson Street. The Court finds that the Bankruptcy Judge did not err in concluding that the rural half-tract of land was not impressed with a homestead character at the time of attachment of the judgment lien.

IV.

Appellant Debtors claim that the Fenslage judgment (under which the sale by the United States Marshal was conducted) was a preferential transfer and that therefore the judgment lien should be set aside under §547 of the Bankruptcy Code. The provisions of §547 set forth the requirements necessary for the avoidance of specified transfers made within three months of the filing of the bankruptcy petition. The Court has already found that under the holding of Semple v. Eubanks, supra, the lien was perfected more than two years before the filing of the petition in bankruptcy. For that reason alone the judgment lien was not a voidable preferential transfer. The Court therefore does not reach the question of whether the judgment lien would

have been such a transfer if it had been perfected within three months of the bankruptcy.

V.

For the foregoing reasons the decision of the Bankruptcy Judge should be affirmed.

It is so ORDERED.

ENTERED this 15th day of September, 1981.

s/s Mary Lou Robinson
United States District
Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION

| | | |
|---|---|---|
| IN RE: | ) | |
| | ) | |
| FOY HASKELL DAWKINS | ) | |
| and | ) | |
| MARY LORENA DAWKINS | ) | No. 281-00013 |
| | ) | |
| DEBTORS | ) | (Chapter 11) |
| FOY HAWKELL DAWKINS | ) | |
| and | ) | |
| MARY LORENA DAWKINS | ) | |
| Plaintiffs | ) | |
| | ) | |
| VS. | ) | Adversary No. |
| | ) | 281-0013 |
| | ) | |
| JODY FENSLAGE | ) | |
| | ) | |
| Defendant | ) | |

## MEMORANDUM AND ORDER

The debtors, Foy Haskell Dawkins and Mary Lorena Dawkins, had instituted these proceedings in the 47th Judicial District Court of Armstrong County, Texas, seeking to avoid a Marshal's deed to a tract of real estate to their former daughter-in-law, Jody Fenslage. They allege that the subject real estate was their homestead and was therefore not subject to levy by the United States Marshal under a judgment against them obtained by Jody Fenslage. After the proceedings were filed in the state court the debtors filed petition for order for relief under Chapter 11 of Title 11, United States Code. Jody Fenslage timely removed these proceedings to the bankruptcy court.

Trial of the issues was conducted by the court sitting without a jury on March 31, 1981.

The following factual summary, which was derived from admissions in the pleadings and from the evidence adduced at trial, constitute the findings of fact contemplated by Rules of Bankruptcy Procedure, Rule 752.

The debtors, Foy Haskell Dawkins and Mary Lorena Dawkins, are the parents of Jesse Arnold Dawkins, Donald Ray Dawkins (the former husband of Jody Dawkins Fenslage) and Anita Foy Bedkey. Jody Fenslage and Donald Ray Dawkins were divorced in 1975. The divorce decree awarded custody of two minor children of the marriage to Jody Fenslage, the mother. During the summer of 1976, while Jody Fenslage was residing in Arizona, the children visited their father at his home in Texas. Instead of returning the children to the custody of their mother at summer's end, Donald Ray Dawkins fled to Canada with the children.

Jody Fenslage filed diversity action in CA2-76-126 in the United States District Court for the Northern District of Texas at Amarillo against her former husband, his parents and other of his relatives, alleging that they conspired to take and conceal her children and that they intentionally inflicted mental anguish upon her. After trial the jury found that certain of the defendants had committed the acts as charged and awarded both compensatory damages and punitive damages against the individual defendants. The district judge entered judgment against the debtors, Foy Haskell Dawkins and Mary Lorena Dawkins, in the sum of $80,000.00 ($65,000.00 compensatory and $15,000.00 punitive damages), jointly and severally, with interest at the rate of 9% per annum, which was filed by the clerk on August 17, 1978.,

On that same date of August 17, 1978, the district clerk issued abstracts of the judgment which Jody Fenslage immediately recorded that same day in the Judgment Records of Armstrong

County, Texas. The effect of the recording of the abstracts was to impress a judgment lien against all of the non-exempt real estate owned by the debtors in Armstrong County, Texas.

On August 17, 1978, when the abstracts of judgment were recorded, the debtors owned three tracts of real estate in Armstrong County, Texas--a residence at 404 Wilson Street in Claude, Texas, which they had occupied and claimed as their urban homestead since 1975, another tract of real estate on Hermosa Street in Claude, Texas, upon which they had earlier expressed an intention to build a residential homestead, and the subject half section (324 acres, more or less) of ranch land in a rural area of the county. Nine days later, on August 26, 1978, the debtors conveyed the residence at 404 Wilson Street in Claude, Texas (which until that date they had claimed as residential homestead), to their daughter, Anita Foy Bedkey, and her husband, alleging consideration of $8,000.00 cash and vendor's lien note for $25,000.00. They commenced preparations to construct a residence on the half section of rural land and claimed from that date a homestead in two hundred acres of that half section as authorized by V.A.T.S. Article 3833.(1) They staked and dug a foundation for a residence to built on the tract, they moved some building material to the site, they arranged for an electric drop to be extended to the site, and they prepared to dig a well. They continued to live at the 404 Wilson Street addressed and never completed the proposed residence on the ranch land.

The debtors had perfected an appeal of the judgment to the United States Court of Appeals for the Fifth Circuit. However, they filed no supersedeas bond. On October 6, 1978, the United States Marshal levied on the half section of rural land. At the sale on November 7, 1978, Jody Fenslage's bid of $25,000.00 was the

highest bid for the tract. It is the United States Marshal's deed to Jody Fenslage of the subject half section--the West one-half (W/2) of Section 172, Block B-4, H&GN Survey, cert. 15/3465, Armstrong County, Texas--which the debtors seek to avoid by this action.

The United States Court of Appeals for the Fifth Circuit affirmed the judgment of the district court on November 6, 1980. Fenslage v. Dawkins et al, 5th Cir. 1980, 629 F2d 1107. The debtors filed their chapter 11 petition 88 days later on February 2, 1981.

The debtors present two theories of recovery. First, they contend that two hundred acres of the subject half section of ranch land was their homestead at the time of the Marshal's sale on November 7, 1978, and thus was exempt from execution. Second, they contend that the judgment did not become final until the Fifth Circuit affirmed the judgment on November 7, 19080, which was less than 90 days before the Chapter 11 petition was filed, and that the judgment lien is thus avoidable. The debtors can prevail on neither of those theories.

Jody Fenslage recorded her abstracts of judgment on August 17, 1978. Those abstracts of judgment comported with the requirements of V.A.T.S. Article 5447, which identifies the data which must be contained in an abstract of judgment. When those abstracts of judgment were recorded in Armstrong County, Texas, the debtors were claiming the residence at 404 Wilson Street in Claude, Texas, as their homestead. Although the tesimony did not develop precisely when the debtors formed an intention to claim a rural homestead in 200 acres of the half section, the earliest date that such claim of homestead could have been effective was August 26, 1978, when the urban residential homestead was conveyed to their daughter. On that date the entire half section of ranch land was already

subject to the judgment liens which secured the $80,000.00 federal court judgment.

Those judgment liens against the half section were effective from August 17, 1978, notwithstanding that the judgment was not affirmed by the Fifth Circuit until November 6, 1980. No supersedeas bond was filed by the debtors. The filing of an appeal does not preclude a successful litigant from abstracting his judgment and, in case of affirmance, the lien dates from the time of its proper recording and indexing. Semple v. Eubanks, 13 Tex. Civ. App. 418, 35 S.W. 509. Jody Fenslage, the person who holds the judgment liens, is entitled to all of the benefits that would have resulted om those judgment liens had there been no appeal for the affirmance gives effect to the original judgment. Texas Trunk Railway Company v. Jackson, 85 Tex. 607, 22 S.W. 1030.

The appellant in Roman v. Goldberg, 7 SW2d 899, had advanced substantially the same challenge that the debtors are making in this case--that is, that having perfected an appeal the appellee was not entitled to take any steps to affix a lien on any property. The court, citing Semple v. Eubanks, supra, stated, "this question, we think, has been decided adversely to appellant's contentions."

Thus, the judgment liens date, and are effective, from August 17, 1978, and not from the date of affirmance of the judgment on November 6, 1980.[2] Those judgment liens held by Jody Fenslage on August 17, 1978, were effective against all non-exempt real estate owned by the debtors in Armstrong County, Texas, including the subject half section of rural ranch land. The subsequent claim of homestead in 200 acres was subject to those liens. The execution sale on November 7, 1978, and the subsequent deed to Jody Fenslage on November 13, 1978, recorded in Volume 85, Page 367 et seq. Deed Records of

Armstrong County, Texas, were effective to convey title of the West one-half (W/2) of Section 172, Block B-4, H&GN Survey, Cert. 15/3465, Armstrong County, Texas, to Jody Fenslage, and that deed and conveyance may not be avoided by debtors.

LET JUDGMENT BE ENTERED ACCORDINGLY.

The clerk is directed to file this memorandum and order in the adversary proceeding, to file a signed copy thereof in the Chapter 11 proceedings of the debtors in number 281-00013, and in the Chapter 11 proceedings of Jesse Arnold Dawkins and Barbara Beth Dawkins, in 281-00011, and to furnish a copy to each attorney of record and to the United States Trustee.

Entered this 1st day of May, 1981.

s/Bill H. Brister
Bankruptcy Judge

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[1] Art. 3833. Homestead.

(a) if it is used for the purpose of a home, or as a place to exercise the calling or business to provide for a family or a single, adult person, not a constituent of a family, the homestead of a family or a single, adult person, not a constituent of a family, shall consist of:

(1) for a family, not more than two hundred acres, which may be in one or more parcels, with the improvements thereon, if not in a city, town, or village; or

(2) for a single, adult person, not a constituent of a family, not more than one hundred acres, which may be in one or more parcels, with the improvements thereon, if not in a city, town, or village; or

(3) for a family or a single, adult person, not a constituent of a family, a lot or lots, not

to exceed in value ten thousand dollars at the time of their designation as a homestead, without reference to the value of any improvements thereon, if in a city, town, or village.

(b) Temporary renting of the homestead shall not change its homestead character when no other homestead has been acquired.

[2] In any event the provisions of §67 of the Bankruptcy Act which permitted avoidance of liens obtained by attachment, judgment, levy or other legal or equitable process within four months of the filing of the petition were not carried forward into the Bankruptcy Code.